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No. 88-2082

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CHARLES R. CHRISTIANSON and
INTERNATIONAL TRADE SERVICES, INC.,
Petitioners,

vs.

COLT INDUSTRIES OPERATING CORP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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July 21, 1989

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QUESTIONS PRESENTED

1. Should this Court review the Seventh Circuit's application of the long-standing rule that 35 U.S.C. § 112 does not require the disclosure of commercial manufacturing specifications that are not part of the invention claimed in a patent?

2. Should this Court address the contention that inventions and information protected by patent and trade secrecy laws cannot co-exist in the same product, a contention not argued to or addressed by the courts below?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Colt Industries Operating Corp ("Colt")[1] respectfully requests that this Court deny the petition by Charles R. Christianson and International Trade Services, Inc. (collectively "Christianson") for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Seventh Circuit entered on March 22, 1989. The opinion of the Court of Appeals is reprinted in the petitioner's Appendix to the Petition for Writ of Certiorari (hereinafter "PA") 1-21.

[1] Pursuant to Supreme Court Rule 28.1, respondent states that Colt Industries Operating Corp has been merged into Colt Industries Inc., which is wholly owned by Colt Holdings, Inc.

STATEMENT OF THE CASE

Colt appealed to the United States Court of Appeals for the Federal Circuit from the "Final Judgment on Liability" and injunction entered on July 19, 1985 by the United States District Court for the Central District of Illinois. (PA-22-26) That judgment, *inter alia*, declared nine Colt patents invalid as of the time of issue as a matter of summary judgment, declared all of Colt's trade secrets relating to the "M16" rifle to be void, permanently enjoined Colt from enforcing any of those trade secrets, and imposed, without discussion, antitrust and tort liability. (PA-22-26) The Federal Circuit transferred Colt's appeal to the Seventh Circuit, which transferred the appeal back again, whereupon the Federal Circuit decided the appeal in Colt's favor. On December 14, 1987 this Court granted certiorari, 484 U.S. ____, 108 S. Ct. 500, limited to the issue of appellate jurisdiction. At that time, this Court declined to review the Federal Circuit's application of 35 U.S.C. § 112 to the merits of this case. Upon remand by this Court to the Seventh Circuit (PA-66), the Seventh Circuit reached the same result as had the Federal Circuit, reversing the district court's decision in its entirety. (PA-21)

Both courts of appeals agreed that Christianson's motion for summary judgment and the district court's decision depended on the novel theory that Colt's failure to disclose the manufacturing specifications for the "M16" rifle in nine patents for various improvements and accessories developed for that rifle invalidated those patents under 35 U.S.C. § 112. The district court's remaining rulings—that all of Colt's trade secrets "relating to the M-16" rifle were invalid (PA-24), and that Colt violated the antitrust laws (PA-25)—all proceeded from this § 112 analysis.

The Seventh Circuit, as the Federal Circuit had, concluded that the district court had wrongly decided the § 112 issues because it had "erred in its definition of the scope of the inventions." (PA-18) Colt had presented uncontradicted evidence to the district court that its patents disclosed sufficient information to enable persons skilled in the art to make and use the

claimed inventions, and to illustrate the best mode known to the inventor of carrying out the claimed inventions (*e.g.*, PA-144-47). The district court, however, erroneously focused on whether the patents disclosed sufficient information to enable the mass production of parts interchangeable with those used in the "M16" rifle, Colt's commercial product. (PA-38, 40-41)

The Seventh Circuit found that these commercial production specifications were not necessary to the claimed inventions and did not have to be disclosed in Colt's patents:

> In the instant case, the specifications and tolerances are not an "integral part" of the inventions. The inventions will work in a rifle, assuming all the other information about the inventions is disclosed, without any data regarding the specifications and tolerances required for commercial utilization of the inventions in the M16.

(PA-13-14) The Federal Circuit's opinion had made clear that this result follows from long-standing principles of patent law:

> [T]he law has never required that a patentee who elects to manufacture its claimed invention must disclose in its patent the dimensions, tolerances, drawings, and other parameters of mass production not necessary to enable one skilled in the art to practice (as distinguished from mass-produce) the invention. Nor is it an objective of the patent system to supply, free of charge, production data and production drawings to competing manufacturers. . . . [T]he law requires that patents disclose inventions, not mass-production data, and that patents enable the practice of inventions, not the organization and operation of factories. The requirement for disclosure of sufficient information to enable one skilled in the art to practice the best mode of the *claimed* invention is and has been proven fully adequate for over 150 years.

(PA-103)(emphasis in original).

Because the Court of Appeals concluded that Colt had not violated § 112, no basis remained for sustaining the district court's rulings invalidating Colt's trade secrets or finding Colt liable for antitrust violations. (PA-20, 106) The Seventh Circuit therefore reversed the district court's decision, and directed the district court to enter "summary judgment for Colt on the issue of the adequacy of its patent disclosures." (PA-10)

REASONS FOR DENYING THE WRIT

A. *Petitioner Has Demonstrated No "Special and Important" Reasons Justifying the Court's Discretionary Review of This Case.*

Christianson, while questioning the correctness of the decision below, has demonstrated no reason, consistent with Supreme Court Rule 17.1, why this case is worthy of review by this Court. The decision of the Court of Appeals does not raise a novel and important issue – it is clearly compelled by established law. The decision of the Court of Appeals does not contradict any case decided by this Court; petitioner concedes that the case involves an issue "that this Court has never directly addressed." Petition for Writ of Certiorari of Charles R. Christianson and International Trade Services, Inc. (hereinafter "Pet. for Cert.") at 14. Finally, there is no division among the circuits. The Seventh and Federal Circuits reached the same result in this case, a result consistent with a long line of established authority.

Christianson's sole basis for its claim that review is appropriate is that the decision of the Court of Appeals conflicts with the decision of the Sixth Circuit in *Union Carbide Corp. v. Borg-Warner Corp.*, 550 F.2d 355 (1977). *Union Carbide*, however, does not stand for Christianson's thesis that the manufacturing detail for a commercial product is the standard for § 112 disclosure.[2] In *Union Carbide*, the patentholder had failed to

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[2] In *Union Carbide*, the patentholder, *before* applying for a patent, had installed in his pilot manufacturing plant equipment which was more

(Footnote continued)

disclose, not *one* commercially feasible mode of carrying out the patented process, but what he knew to be the *best* mode of performing that process. The Sixth Circuit did not hold, as Christianson contends, that "the 'best mode' can logically be presumed to be the commercial embodiment." (Pet. for Cert. at 18) Commercial production specifications played no part in the Sixth Circuit's decision. Accordingly, Christianson's assertion that *Union Carbide* indicates the existence of a conflict among the circuits is without merit.

Here, Colt's patents did disclose the best mode of utilizing the claimed inventions. Christianson asserts, however, that more is required—that Colt was obliged to disclose in its patent applications not only information regarding the claimed inventions, but the specifications and tolerances it used in manufacturing the "M16" rifle, a particular product incorporating those inventions, or in manufacturing parts interchangeable with those of the "M16" rifle. Christianson has utterly failed to demonstrate a conflict among the circuits, or a conflict with any decision of this Court, with respect to this issue. Certiorari should accordingly be denied.

B. *The Court of Appeals Correctly Decided the Section 112 Issue By Applying Established Precedent.*

Christianson asks this Court to grant certiorari in order to adopt the novel theory that, regardless of the scope of Colt's patent claims, 35 U.S.C. § 112 requires the disclosure of detailed manufacturing specifications necessary to mass produce interchangeable parts used in Colt's commercial product, the "M16" rifle, a product for which Colt has never claimed patent protection.[3]

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sophisticated, and performed better, than that disclosed in his application for a process patent. 550 F.2d at 360-61. The Sixth Circuit held the patentholder had failed to disclose in his patent the "best mode" for carrying out the invention, as required by 35 U.S.C. § 112.

[3] Christianson's assertion that "[t]he missing disclosure was *not* the mass production specifications for the M-16 rifle" but merely "a few *critical* dimensions

(Footnote continued)

It has, however, always been the law that § 112's disclosure requirements extend only as far as the scope of the claimed invention. *See Randomex, Inc. v. Scopus Corp.*, 849 F.2d 585, 588 (Fed. Cir. 1988); *DeGeorge v. Bernier*, 768 F.2d 1318, 1324 (Fed. Cir. 1985); *Illinois Tool Works, Inc. v. Foster Grant Co.*, 547 F.2d 1300, 1309 (7th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977); *International Telephone & Telegraph Corp. v. Raychem Corp.*, 538 F.2d 453, 460 (1st Cir.), *cert. denied*, 429 U.S. 886 (1976).

In this case, both the Seventh Circuit and the Federal Circuit correctly analyzed the issue of patent validity by determining whether Colt's claimed inventions required that parts incorporating them be interchangeable with those of the "M16" rifle. Finding that they did not, the Seventh Circuit went on to hold that Colt's patent disclosures satisfied the well-settled rule that patent specifications need not be production specifications.[4] (PA-12, 19) The Federal Circuit reached the same conclusion, stating: "Patents are not production documents, and nothing in the patent law requires that a patentee must disclose data on how to mass-produce the invented product in patents obtained on either individual parts of the product or on the entire product." (PA-103)[5] This rule is well-grounded in policy, for

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and tolerances needed to figure out how to make the patented part interchangeable in the M-16," Pet. for Cert. at 6 (emphasis in original), is unsupported both by the section of the district court's opinion cited by Christianson and by the record as a whole.

[4] *In re Gay*, 309 F.2d 769, 774 (C.C.P.A. 1962); *see also Douglas v. United States*, 510 F.2d 364, 366 (Ct. Cl.)(*per curiam*), *cert. denied*, 423 U.S. 825 (1975); *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 461 F.2d 66, 74 (3d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Indecor, Inc. v. Fox-Wells & Co.*, 642 F. Supp. 1473, 1490 (S.D.N.Y. 1986); *Atlas Powder Co. v. E.I. du Pont de Nemours & Co.*, 588 F. Supp. 1455, 1467 (N.D. Tex. 1983), *aff'd*, 750 F.2d 1569 (Fed. Cir. 1984).

[5] Even if there had been a legitimate question about the adequacy of Colt's patent disclosures, there was no precedent for the district court's extraordinary remedy. No court had ever before invalidated a party's trade secrets solely by reason of a finding of insufficient disclosure under § 112. The district court did not even stop there, but also ordered Colt to disgorge all trade secrets in

(Footnote continued)

to require the disclosure of a mass of unclaimed manufacturing detail would, rather than encouraging greater disclosure as Christianson suggests, instead discourage inventors from seeking patent protection at all.

Because neither the specifications for the "M16" rifle nor the requirement of interchangeability with parts for the "M16" rifle appeared in the patent claims, § 112 did not require Colt to disclose manufacturing specifications for the "M16" rifle in its patent applications. Christianson's contention that Colt was required to make disclosure well beyond the scope of its patent claims is directly contrary to well-settled patent law.[6]

There is no conflict among the circuits on this issue. Indeed, the Seventh Circuit and the Federal Circuit, confronted with

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existence relating to "M16" rifles, whether or not related to interchangeability or to the parts mentioned in the particular patents. The district court went on to grant final judgment upholding Christianson's antitrust claims without Christianson even having asked for such a judgment, without any evidence that Colt had defrauded the Patent Office, and without any evidence relevant to such necessary antitrust inquiries as the definition of the relevant market or Colt's market power.

[6] Christianson refers to this case as "widely referenced," Pet. for Cert. at 14 n.10, 25, suggesting significant interest in the case by commentators and the patent bar. What may have been noteworthy, however, was the district court's radical departure from established law. The Courts of Appeals' decisions merely restore patent and trade secret law to normal. *See, e.g.*, Resolution 605-1 of the Section of Patent, Trademark and Copyright Law of the American Bar Association, which stated:

> that 35 U.S.C. Section 112 does not and should not require patent application disclosures to include mechanical tolerances of any particular specimen or model embodying the invention beyond that sufficient to enable a person of ordinary skill in the art to which the invention pertains to make and use the invention utilizing the engineering of those of such ordinary skill; and Specifically, the Section believes that the Federal Circuit opinion in *Christiansen* [sic] *v. Colt Industries*, ____F.2d____, 3 USPQ 2nd 1241 (Fed. Cir. 1987) is essentially correct insofar as it concerns the disclosure requirements of 35 U.S.C. Section 112.

Resolution 605-1 of the Section of Patent, Trademark and Copyright Law of the American Bar Association, *reprinted in* PTC Newsletter, Vol. 7, No. 2 (Fall 1988) at 10-11.

the issues in the instant case, each decided them—unanimously—the same way.[7] For these reasons and the reasons set forth in the opinions of the Federal and Seventh Circuits, this Court should not reexamine these well-established principles of patent law.

C. *Petitioner's Contention that Information Protected by Patents and Trade Secrets Cannot Co-exist in the Same Product is Without Merit and Was Not Argued to or Addressed by the Courts Below.*

Christianson's contention that the Seventh Circuit's decision provides a novel mechanism for "extending patent monopolies under state law" is simply wrong.

Colt could not have improperly extended its patent monopoly on the "M16" rifle indefinitely because Colt never sought or obtained a patent on the "M16" commercial product as a whole. Colt's patents were for inventions that could be used in *a rifle*. Some such inventions Colt actually incorporated into the "M16" rifle. During the lifetime of those patents other producers would have been precluded from using those patented components to produce *any* rifle, whether or not similar or even identical to the "M16". However, although Colt never claimed patent protection for the "M16" rifle as a whole or for the dimensions of its components, Christianson contends that because the "M16" rifle incorporates components for which Colt at one time had patent protection, Colt may not now claim trade secret protection as to any other element of that product. Put simply,

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[7] Christianson contends that the Seventh Circuit "in essence . . . adopted as precedent," Pet. for Cert. at 19, the opinion of the Federal Circuit in this case, which was vacated by this Court's ruling that the Federal Circuit lacked jurisdiction over the appeal. ____U.S.____, 108 S. Ct. 2166, 2179 (1988). (PA-66) Christianson argues that this Court is now required to grant the petition for certiorari to avoid rendering this Court's prior jurisdictional ruling "a hollow exercise." Pet. for Cert. at 20 n.16. Christianson's argument ignores the Seventh Circuit's clear acknowledgment that the Federal Circuit's decision was not binding on it (PA-11) and its statement that it simply found the reasoning of that opinion, while not precedential, to be persuasive. *See, e.g.*, PA-11 (references to "the comprehensive nature of the [Federal Circuit's] decision," and "the [Federal Circuit] court's thorough analysis").

Christianson's argument is that Colt is prohibited from combining patented inventions and specifications subject to trade secret protection in the same product – or that, by doing so, Colt forfeits any trade secret rights in components of the "M16" after its patents expire.

First, Christianson is wrong on the merits.[8] The courts have acknowledged that it is "merely normal business practice" to maintain the details of a commercial manufacturing process as trade secrets, even when the product being manufactured is subject to some patent protection as well. *Illinois Tool Works Inc. v. Solo Cup Co.*, 179 U.S.P.Q. 322, 368 (N.D. Ill. 1973). A large number of cases illustrate the common practice of protecting different aspects of the same product under both the patent and trade secret laws. *See, e.g., Dekar Industries, Inc. v. Bissett-Berman Corp.*, 434 F.2d 1304, 1305 (9th Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *CPG Products Corp. v. Mego Corp.*, 502 F. Supp. 42, 43-44 (S.D. Ohio 1980); *Reinforced Earth Co. v. Neumann*, 201 U.S.P.Q. 205, 207, 208, 211, 215-16 (D. Md. 1978); *Lundy Electronics & Systems, Inc. v. Optical Recognition Systems, Inc.*, 362 F. Supp. 130, 156-58 (E.D. Va. 1973), *aff'd per curiam*, 493 F.2d 1222 (4th Cir. 1974).

Second, and of significance to the Court's consideration of this petition, is the fact that this issue was never argued to, or decided by, either the Court of Appeals or the district court. Christianson's argument to the courts below was entirely premised on the claim that Colt's failure to disclose commercial production specifications for the "M16" rifle violated § 112. Having lost on that ground before two unanimous Courts of Appeals,

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[8] Moreover, any attempt to apply Christianson's argument to the instant case indicates the unworkability of its position. The nine patents whose validity was challenged here were not the original patents covering the rifle's basic design features, but were later patents Colt obtained on improvements. (PA 3, 113) Colt's basic patents *had already been obtained* before Colt developed the specifications and tolerances it now seeks to protect as trade secrets. Under Christianson's theory, Colt lost its right to protect those trade secrets before it had even developed them.

Christianson's somewhat murky petition now attempts to assert, ostensibly as a possible alternative ground for the district court's ruling, that *even though* Colt did not violate § 112, it *still* may not assert any trade secret protection with regard to any aspect of the "M16" rifle. Pet. for Cert. at 11-12 ("[T]he Seventh Circuit only addressed the issue of the sufficiency of Colt's patent disclosures. It did not discuss the impropriety of extending Colt's patent monopoly regardless of compliance with § 112, which could have provided a base for affirmance."). Having failed to raise this argument in the courts below, and the Court of Appeals accordingly having failed to address it, Christianson seeks to have this Court rule on the question in the first instance. However, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*). Petitioner offers no reason why the Court should, in this case, take the extraordinary step of considering an issue neither raised nor decided below.

Just last Term, this Court reaffirmed its established precedent that "state protection of trade secrets did not operate to frustrate the achievement of the congressional objectives served by the patent laws." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, ____U.S.____, 109 S. Ct. 971, 979-80 (1989)(citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974)). Nothing in Christianson's petition suggests that this case involves any impermissible extension of trade secrets into the patent law area.

Colt's patent and trade secret rights are separate and separable; Federal patent law does not prevent Colt from claiming the benefits of state trade secret law to protect nonpublic information in which no patent rights are asserted. Petitioner's novel claim, not raised in any court below, does not merit this Court's review.

CONCLUSION

This case presents no opportunity to clarify any unsettled issues of patent or trade secret law. It merely presents a straightforward application of a principle that has stood the United States patent system well throughout its long history: a patent need not disclose manufacturing data unnecessary to the claimed invention. No court has found any conflict between patenting inventions and maintaining trade secret protection in manufacturing details of products incorporating those inventions. No court has discovered any principle of federal patent law that demands that trade secret protection be denied to production data of the type Colt has endeavored to protect. No conflict among the circuits exists on these well-settled issues. This case presents no conflict with any decision of this Court. Petitioners have therefore presented no reason for reexamining the Seventh Circuit's restatement of these long-standing principles.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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